United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1169-1287

United States Court of Appeals

For the Second Circuit.

Docket No. T-3128.

ATAKA & CO., LTD.,
Plaintiff-Appellant and Cross-Appellee,

against

DERRICK BARGE HOWLETT NO. 18, its engines, boilers, etc., M. P. HOWLETT, INC., and EDWARD WITHAM,
Defendants and Third-Party Plaintiffs-Appellees and Cross-Appellants,

against

ISTHMIAN LINES, INC., STATES MARINE-ISTHMIAN AGENCY, INC., MAHER STEVEDORING COMPANY, INC., and INTERNATIONAL CARGO GEAR BUREAU, INC.,
Third-Party Defendants,

and

THE HOME INSURANCE COMPANY,
Third-Party Defendant and Fourth-Party Plaintiff,

against

FIREMAN'S FUND INSURANCE COMPANY,
Fourth-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES AND CROSS-APPELLANTS.

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BRIEF FOR APPELLEES AND CROSS-APPELLANTS.

The plaintiff below, Ataka & Co., Ltd., moved (a) for summary judgment against defendants M. P. Howlett, Inc. and derrick barge Howlett No. 18 and (b) to strike defendants' COGSA package limitation defense. The court below granted the motion for summary judgment but denied the motion to strike the COGSA defense. The plaintiff below has appealed from the judgment insofar as it limited the recovery to $500. The defendants now cross-appeal on the ground that summary judgment was improperly entered against them.

Question Presented on Cross-Appeal.

Are the cross-appellants M. P. Howlett, Inc. and derrick barge Howlett No. 18 liable to the plaintiff even if the proximate cause of plaintiff's loss was not cross-appellants' negligence, but rather the negligence of third-party defendant Maher Stevedoring Company, Inc. and/or the negligence of third-party defendant Isthmian Lines, Inc.?

Summary of Argument.

There are many issues of fact as to whether the negligence of cross-appellants or one or more of the third-party defendants caused plaintiff's loss. Cross-appellants contend that summary judgment was improperly granted against them because they cannot be held vicariously liable for the negligence of the third-party defendants.

Facts.

Plaintiff's cargo was delivered to third-party defendant Isthmian Lines, Inc., for shipment to Japan aboard the S. S. Steel Admiral (A21).* The cargo consisted of

*Numerals with the prefix "A" refer to pages in the Joint Appendix.

a 12-ton revacycle machine packaged by plaintiff in one wooden Gleason case which, because of its weight, could be loaded aboard the S. S. Steel Admiral only with special heavy-lift equipment (A38). Third-party defendant Isthmian Lines, Inc., had chartered defendant derrick barge Howlett No. 18 from its owner, defendant M. P. Howlett, Inc., to perform this function (A23).

The derrick barge was non-self-propelled and consisted of a crane mounted on a floating barge. The crane operator was defendant Edward Witham. He received all of his instructions from Isthmian Lines' dock boss, Charles Lewis (A38).

Late on a Friday afternoon the Gleason case containing plaintiff's cargo was lifted from the dock by the barge's crane and placed on the deck of the derrick barge without incident. Employees of third-party defendant Maher Stevedoring Company, Inc., acting pursuant to a contract with Isthmian Lines, Inc., then secured the case to the barge's deck. The entire operation was supervised by Isthmian Lines' dock boss, Charles Lewis. A second Gleason case of equal weight was secured to the barge in exactly the same way by the same persons (A38-39).

During the loading operation on Friday afternoon, dock boss Charles Lewis told defendant Edward Witham, the operator of derrick barge Howlett No. 18, that the barge's crane was scheduled for testing early on the following Monday morning. Witham had no prior knowledge that the test had been scheduled. The remainder of this conversation (as to whether the cargo should remain on deck during the test) is subject to sharp issues of fact. At their respective depositions, Lewis claimed that Witham preferred that the cargo remain on board to "improve stability," while Witham testified that he asked Lewis,

from whom he took all his instructions, whether the cargo could remain on deck during the test and that Lewis replied that "it would be all right" (A39).

Witham also testified that he had tested the crane with cargo aboard on a prior occasion without any problems. In 18 years as a crane operator he never had cargo fall overboard or even shift on his deck. Charles Lewis admitted at his deposition that Witham "is the best crane operator they got. He is very careful. He doesn't take chances" (A39).

The test required the crane to hoist a 66-ton weight and rotate the boom a full 360 degrees. In accordance with applicable federal regulations, the test was supervised by an independent surveyor Eric H. Johanson of third-party defendant International Cargo Gear Bureau, Inc. Mr. Johanson saw the cargo on the deck but did not ask that it be removed. He testified at his deposition that federal regulations did not forbid the presence of cargo and that he recalls nothing unusual about its stowage (A39-40).

At about 8:30 a.m. on Monday, April 6, 1970, defendant Witham operated the crane to lift the test tank and, as he was rotating the boom, plaintiff's Gleason case which had been secured to the barge's deck by third-party defendant Maher Stevedoring Company, Inc., under the direction of third-party defendant Isthmian Lines, Inc., slid off the deck of the derrick barge into the river. The second Gleason case, which weighed the same amount and was handled in the same manner by the same personnel, remained secured to the deck (A40-41).

With all issues of fact resolved in cross-appellant's favor, it is clear that plaintiff's loss may have been occasioned by the negligence of third-party defendant Maher

Stevedoring Company, Inc., in failing properly to secure the Gleason case to the deck of the barge and/or the negligence of third-party defendant Isthmian Lines, Inc., in improperly supervising the securing of the cargo. Each of these parties was impleaded pursuant to Rule 14(c) of the Federal Rules of Civil Procedure, pertaining only to admiralty and maritime claims, on the ground that they were *directly* liable to the plaintiff.

Cross-appellants contend that they cannot be held vicariously liable for the negligence of either third-party defendant and that, accordingly, summary judgment was improperly entered against them.

POINT I.

The court below improperly granted summary judgment against cross-appellants because plaintiff's loss may have been occasioned by the negligence of others for which cross-appellants cannot be held vicariously liable.

The foregoing statement demonstrates that there are many issues of fact as to which party's negligence was the proximate cause of plaintiff's loss. Under these circumstances summary judgment could be granted against cross-appellants only if they would be liable to plaintiff regardless of how each issue of fact was resolved, i. e., regardless of whose negligence was the proximate cause of the loss. The court below did not address this point directly but, instead, wrote (A51):

> "The defendants were the last to have actual direct control over plaintiff's goods prior to the damage to them. Judgment will enter against them and thereafter they may pursue their third-party claims."

The court overlooked the fact that the negligence of third-party defendants Maher Stevedoring Company, Inc., and Isthmian Lines, Inc. (which must be assumed for purposes of this appeal), occurred prior to the time when cross-appellants gained custody of plaintiff's cargo. Moreover, cross-appellants never had "actual direct control" over the manner in which the cargo was secured to the deck of the derrick barge.

As is demonstrated hereinabove, Isthmian Lines hired two independent contractors to perform separate stevedoring functions. Cross-appellant's crane operator was directed merely to lift the two Gleason cases with his crane and place them on the deck of the derrick barge. The function of securing the cargo to the barge's deck was assigned to and entirely performed by employees of third-party defendant Maher Stevedoring Company. The entire operation was supervised by Isthmian Lines' dock boss, Charles Lewis, not by cross-appellant. No employee of cross-appellant participated in the securing of the cargo. When the crane was tested, only one of the Gleason cases slid off the barge's deck (A41). The other had been adequately secured.

Crane operator Witham did not know that the test had been scheduled until Charles Lewis, Isthmian Lines' dock boss, told him so (A39). He had tested the crane with cargo aboard on a prior occasion without any problem (A39). Since his duties related only to the operation of the crane and not to the stowage of cargo, he was entitled to rely upon the adequacy of the stevedore's method of securing the cargo in the absence of obvious defects.

Hastorf Contracting Co. v. Ocean Transp. Corp., 4 F. 2d 583 (SDNY, 1923), affd. 4 F. 2d 584 (2nd Cir., 1924);

Shamrock Towing Co. v. Schiavone-Bonomo Corp., 275 F. 2d 338, 341 (2nd Cir., 1960);
Hutton Company v. Arrow Builders Supply Corp., 371 F. 2d 944 (2nd Cir., 1967).

That there were no obvious defects is confirmed by the employee of International Cargo Gear Bureau, Inc., the only person other than Witham who was present during the test (A40).

Cross-appellants cannot be held vicariously liable for the negligence of Maher Stevedoring Company, Inc., under traditional concepts of tort law because cross-appellants had no control over Maher's securing of the cargo. The Maher employees were under the control of Isthmian Lines' dock boss, not cross-appellants. See, for example:

Reynolds v. John T. Brady & Co., Inc., 38 A. D. 2d 746 (2nd Dept. 1972);
Pantori v. Welsbach Corp., 43 A. D. 2d 767 (1st Dept., 1973).

Moreover, liability cannot be imposed upon cross-appellants under contract law. Cross-appellants had no contract with plaintiff and Isthmian Lines subcontracted its duty of proper stowage to Maher Stevedoring Company, not to cross-appellants. Finally, even if cross-appellants be considered sub-bailees of plaintiff's cargo, they cannot be responsible for negligence which occurred before the sub-bailment relationship arose and over which they had no control. See *Sisung v. Tiger Pass Shipyard Co., Inc.*, 303 F. 2d 318 (5th Cir., 1962) where the court wrote at pages 322-323:

> "Furthermore, where the [bailor] maintains some dominion over the vessel, as Sisung did by selecting the place of mooring, there is a corresponding limitation on the duty of the bailee or one in possession."

In the case at bar, Isthmian Lines retained dominion over plaintiff's cargo by assigning its stowage to Maher Stevedoring Company rather than to cross-appellants. Cross-appellants' duties as sub-bailees were correspondingly diminished. See, also, *Stegemann v. Miami Beach Boat Slips, Inc.*, 213 F. 2d 561 565 (5th Cir., 1954).

When issues of fact are resolved in cross-appellant's favor, as they must be for purposes of this appeal, it becomes apparent that plaintiff's loss may also have been occasioned by the negligence of third-party defendant Isthmian Lines, Inc., in supervising the securing of the cargo. Crane operator Witham had successfully tested the crane with cargo on the barge's deck (A39), and he was entitled to rely on the instructions of the dock boss. See, for example, *Krawill Machinery Corp. v. Robert C. Herd & Co.*, 145 F. Supp. 554, 558-9 (D. Md., 1956), where the operator of a floating crane was held not to be liable for following negligent instructions. Cf. *Ciejek v. Crane Service Company*, 351 F. 2d 788 (D. C. Cir., 1965) where the court wrote at page 792:

> "But the bare fact that the operation of the crane resulted in an injury would not at all events establish the culpable neglect of the crane operator if the injury was caused, not by any lapse or lack of care by the crane operator in the operation of his crane, but rather because the particular utilization of the crane ordered and directed by the general employer was either foolhardy in its original conception or carelessly supervised in its execution."

Consequently, in the case at bar, it is quite possible that Isthmian Lines was negligent while cross-appellants were not. While Isthmian Lines may be vicariously liable for cross-appellants' negligence, the reverse is not true; an independent contractor cannot be liable for the torts of the person who hired him.

Since cross-appellants cannot be held vicariously liable for the negligence of the third-party defendants, the lower court's granting of summary judgment against cross-appellants must be reversed.

In Opposition to Plaintiff's Appeal.

In accordance with Rule 28(h) of the Federal Rules of Appellate Procedure defendants M. P. Howlett, Inc., and derrick barge Howlett No. 18 now present their argument in opposition to plaintiff's appeal.

POINT II.

The court below properly held that defendants M. P. Howlett, Inc. and Derrick Barge HOWLETT No. 18 are entitled to the benefit of the $500 package limitation.

Plaintiff conceded at oral argument in the court below that its cargo constituted one "package" within the meaning of Clause 15 of the bill of lading (A36) and COGSA, 46 U. S. Code, §1304(5). It also conceded that Isthmian Lines, Inc., having issued its dock receipt, was entitled to the benefit of the $500 COGSA package limitation even though the cargo had not been loaded aboard the Isthmian Lines vessel at the time of the loss. See page 4 of plaintiff's reply memorandum below, paragraph 2 of the bill of lading (A36) and such cases as *Berkshire Knitting Mills v. Moore-McCormack Lines, Inc.*, 265 F. Supp. 846 (S.D.N.Y., 1965). Consequently, the only issue on plaintiff's appeal is whether the $500 package limitation inures to the benefit of defendants M. P. Howlett, Inc., and derrick barge Howlett No. 18. The court below properly held that it does.

There can be no doubt that a shipper and a carrier may, in a bill of lading, extend the benefits of COGSA to third parties.

Carle & Montanari Inc. v. American Export Isbrandtsen, Inc., 275 F. Supp. 76 (S.D.N.Y., 1967), affd. 386 F. 2d 839 (2nd Cir., 1967), cert. den. 390 U. S. 1013 (1968);
Bernard Screen Printing Corp. v. Meyer Line, 328 F. Supp. 288 (S.D.N.Y., 1971), affd. 464 F. 2d 934 (2nd Cir., 1972), cert. den. 410 U. S. 910 (1973);
Secrest Machine Corp. v. S. S. Tiber, 450 F. 2d 285 (5th Cir., 1971);
Middle East Export Co. v. Concordia Line, 64 Misc. 2d 270 (Civ. N. Y., 1970), mod. on other gds. 71 Misc. 2d 365 (App. Term, 1972);
Tidewater Venice, Inc., v. M/V Schwarzenfels, 1972 A. M. C. 1775 (E. D. La., 1972), not otherwise reported;
Royal Typewriter Co. v. M/V Kulmerland, 346 F. Supp. 1019, 1025, n. 6 (S.D.N.Y., 1972), affd. 483 F. 2d 645 (2nd Cir., 1973);
Elgin National Industries, Inc., v. S. S. Weser Express, 1973 A. M. C. 1404 (S.D.N.Y., 1973), not otherwise reported.

Paragraph 3 of the bill of lading (A36) extends the carrier's COGSA rights to defendant M. P. Howlett, Inc., owner of derrick barge Howlett No. 18. The paragraph reads as follows:

"3. Carrier's Servants, Agents, Stevedores, Contractors, etc. Because Carrier requires persons and companies to assist it in the performance of all work and services undertaken by it in connection with the cargo described herein as well as the cargo of others transported or to be transported by Carrier, it is expressly agreed between the parties hereto that the Master, officers, crew mem-

> bers, contractors, stevedores, longshoremen, agents, representatives, employees and others used, engaged or employed by Carrier in the performance of the aforesaid work and services of Carrier, shall each be a beneficiary of this contract and shall be entitled to all exemptions and immunities from and limitations of liability which Carrier has under this bill of lading, whether written, printed or stamped hereon or incorporated by reference herein, and under the United States Carriage of Goods by Sea Act, 1936, and in entering into the provisions of this Clause, Carrier to the extent of such provisions, does so not only on its own behalf but also as agent and trustee of each of the persons and companies described above, all of whom shall be deemed parties to the contract in or evidenced by this bill of lading."

Defendant M. P. Howlett, Inc., is clearly a "stevedore * * * employed by Carrier in the performance of the aforesaid work and services of Carrier" within the meaning of the quoted provision and, accordingly, it is entitled to the benefits of COGSA. *Carle & Montanari, Inc., v. American Export Isbrandtsen, Inc., supra.* Defendant M. P. Howlett, Inc., is also a "contractor" within the meaning of paragraph 3 of the bill of lading. The court wrote in *Bernard Screen Printing Corp. v. Meyer Lines, supra,* at page 290, that:

> "In using the words 'independent contractors' in the instant bill of lading, sufficient guidelines were expressed to indicate the intention of the parties. It was unnecessary to list specifically all possible constituent elements of that term, which would include all the contractors who rendered service for the carrier in connection with the shipment. Where a class of persons such as 'independent contractors' is referred to in a contract, it is clear that the class includes all those reasonably falling within the definition of that class and within the context

> of the transaction. No further degree of particularity is necessary to give the term clarity."

This court affirmed *Bernard Screen,* as noted *supra,* and as recently as last year ratified its holding in *Rupp v. International Terminal Operating Co., Inc.,* 479 F. 2d 674, 677 (1973).

Similarly, defendant derrick barge Howlett No. 18 is entitled to the $500 package limitation set forth at paragraph 15 of the bill of lading (A36). That paragraph limits the liability of the "Carrier" as defined in the bill of lading, not COGSA. "Carrier" is defined in paragraph 1 of the bill of lading:

> "'Carrier' shall include the vessel named herein, her owner, operator, charterer, Master, agent and any substituted carrier * * *."

and derrick barge Howlett No. 18 is clearly a substituted carrier within the meaning of that provision.

Bulkley v. Naumkeag Steam Cotton Co., 65 U. S. (24 How.) 386, 391 (1860);
Fyfe v. Pan-Atlantic S. S. Corp., 114 F. 2d 72, 75 (2nd Cir., 1940);
Federal Ins. Co. v. United States, 60 Fed. 2d 46, 47 (2nd Cir., 1932);
Colton v. N. Y. & Cuba Mail S. S. Co., 27 F. 2d 671, 674 (2nd Cir., 1928).

Even if this provision had not been included in the bill of lading the liability of the derrick barge would have been limited to the same extent as that of its owner. The United States Supreme Court has twice held that statutes which expressly limit a shipowner's *in personam* liability also limit *in rem* liability by implication. See, *The City of Norwich,* 118 U. S. 468 (1886), where Mr.

Justice Bradley wrote at page 503, "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles," and *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo,* 320 U. S. 249, 253 (1943), where, over fifty years later, Mr. Justice Jackson wryly observed that "The riddle * * * does not appear to us to have improved with age." The "common-sense approach" of these cases, which was approved by Mr. Justice Black in *Continental Grain Co. v. Barge FBL-585,* 364 U. S. 19, 24 (1960), is equally applicable here.

Plaintiff's brief attempts to create confusion where none exists. In attempting to bring this case within the rationale of *Cabot Corp. v. S. S. Mormacsan,* 298 F. Supp. 1171 (S.D.N.Y., 1969), affd. 441 F. 2d 476 (2nd Cir., 1971), it distorts the plain language of the instant bill of lading. The *Cabot* bill of lading extended the benefits of COGSA to "all persons rendering services in connection with the performance of this contract," and as the lower court noted (although its ruling was affirmed on other grounds) this language extended COGSA benefits to certain business entities only if they were "rendering" certain services at the moment of the loss. There is no such requirement in the instant bill of lading. Its benefits inure to stevedores and independent contractors provided only that the *carrier* was acting "in the performance of this contract" in "employing" them, and that was surely the case here. Isthmian Lines employed the derrick barge because plaintiff's cargo was too heavy for the ship's tackle (A21, 38). The instant bill of lading is as different from the *Cabot* bill of lading as was that in *Bernard Screen, supra,* and as this court stressed in *Rupp v. International Terminal Operating Co., supra,* the language of the bill of lading is determinative.

Plaintiff's reliance upon *Cosa Export Co. Inc. v. Transamerican Freight Lines, Inc.*, 1968 A. M. C. 1351 (Sup. N. Y., 1968) (not otherwise reported), affd. w/o opinion 303 N. Y. S. 2d 1003 (1st Dept. 1969), is equally misplaced. That case involved a terminal operator who was performing services pursuant to a contract with a party other than the carrier at the time of the loss. The carrier had not yet gained actual custody of the cargo and its employees were not involved in the handling of the cargo. Here, plaintiff's cargo had not only been delivered into the custody of the carrier (A37-38) but the carrier's dock boss, Mr. Lewis, had assumed control over its handling and supervised its stowage on the deck of the derrick barge (A38-39). The crane operator was first told about the test by the carrier's dock boss (A39) from whom he took all his instructions (A38). The barge's crane was tested with the full knowledge of the carrier (A39) and within the scope of the carrier's authority (A39). Consequently, by virtue of the bill of lading, defendant M. P. Howlett, Inc., and derrick barge Howlett No. 18 should receive the benefit of all limitations of liability to which the carrier, Isthmian Lines, is entitled.

Plaintiff's purported deviation argument is an afterthought which was not raised below. The derrick barge was shifted from a States Marine Isthmian pier in Erie Basin (Lewis deposition, p. 3) to a Todd Shipyard pier in Erie Basin (A29, A32), a distance of only a few hundred feet. Witham had previously tested his crane with cargo aboard without incident (A39). Federal regulations did not forbid the presence of cargo on deck (A40) and Mr. Johanson, the test supervisor, recalled nothing unusual about the stowage of plaintiff's Gleason case (A40). The fact that the second Gleason case remained secured to the deck while plaintiff's did not (A41) demonstrates that the maneuver was not "unreasonable." More-

over, paragraph 4 of the bill of lading (A36) provides that "At any time and in all situations Vessel may * * * adjust equipment" and the definition of "Vessel" in paragraph 1 includes substitute vessels and lighters. The derrick barge surely falls within that definition, *Bulkley v. Naumkeag Steam Cotton Co., supra.* In any event, plaintiff's brief does not seem to argue that there was a deviation in the usual sense. Instead it urges that on-deck carriage is an unreasonable deviation and totally ignores that below-deck carriage is impossible on a derrick barge. This specious argument must fail. The use of a derrick barge cannot be held unreasonable as a matter of law especially where, as here, plaintiff's cargo was too heavy for the ship's tackle (A21, A38). *DuPont de Nemours International, S. A. v. S. S. Mormacvega,* 1974 A. M. C. 67 (2nd Cir., 1974), not yet otherwise reported.

A final word might be added. The court below properly noted that plaintiff's recovery would have been limited to $500 if all stevedoring services had been rendered by employees of Isthmian Lines. In hiring independent stevedores and extending the benefits of COGSA to them, Isthmian Lines did not in any way reduce the measure of the cargo owner's recovery. If the cargo owner had been unwilling to risk a loss under these circumstances, it had only to declare "the nature and value of the goods" in accordance with 46 U. S. Code, §1304(5) and paragraph 15 of the bill of lading (A36). As was noted in *Berkshire Knitting Mills v. Moore-McCormack Lines, Inc.,* 265 F. Supp. 846 (S.D.N.Y., 1965), this procedure is "well known to the trade." Having failed to declare the value, the cargo owner cannot now be heard to complain.

Conclusion.

1. The lower court's granting of summary judgment against defendants M. P. Howlett, Inc., and derrick barge Howlett No. 18 should be reversed.

2. The lower court's denial of plaintiff's motion to strike defendants' package limitation defense should be affirmed.

Respectfully submitted,

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